

AS TO THE ADMISSIBILITY OF

Application No. 24260/94
by Maria SCHEIBELHOFER-KÖSTNER
against Austria

The European Commission of Human Rights (First Chamber) sitting in private on 4 September 1996, the following members being present:

Mrs. J. LIDDY, President
MM. M.P. PELLONPÄÄ
E. BUSUTTIL
A. WEITZEL
C.L. ROZAKIS
G.B. REFFI
B. CONFORTI
N. BRATZA
I. BÉKÉS
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL

Mrs. M.F. BUQUICCHIO, Secretary to the Chamber

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 25 May 1994 by Maria SCHEIBELHOFER-KÖSTNER against Austria and registered on 3 June 1994 under file No. 24260/94;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Austrian national, residing in Vienna. In the proceedings before the Commission she is represented by Mrs. Ch. Kolbitsch, a lawyer practising in Vienna.

A. Particular circumstances of the case

The facts of the case, as submitted by the applicant, may be summarised as follows.

On 16 October 1992 the applicant, whose maiden name was Köstner, got married to Mr. Scheibelhofer. Both, she and her husband wanted to keep their former family names. However, S. 93 para. 1 of the Austrian Civil Code (Allgemeines Bürgerliches Gesetzbuch), in the version applicable at the time, provided that spouses had to assume one of their names as their common family name. In case they did not provide otherwise, the husband's family name was to become the common family name. The applicant, making use of the possibility to add her former name with a hyphen, is now called Scheibelhofer-Köstner.

On 18 December 1993 the Constitutional Court dismissed the applicant's complaint, in which she had alleged that S. 93 of the Civil Code was unconstitutional as being discriminatory against women. The Court found that S. 93 of the Civil Code had to be seen in its context.

It provided that the spouses could choose either the husband's or the wife's family name as their common name. The spouse who gave up his or her name could add his or her former name to the common family name. The rule that the husband's name became the family name if the spouses did not provide otherwise did not discriminate against women but had regard to the fact that this was the usual choice. The applicant had not claimed that habits in this respect had changed to an extent which would make this provision unobjective.

B. Relevant domestic law

Civil Code

S. 93 para. 1 of the Civil Code (Allgemeines Bürgerliches Gesetzbuch), in the version which was applicable when the applicant concluded her marriage, provided that the spouses had to assume a common family name, i.e. the name of one of the spouses which they had, before or at the time of the marriage, declared that they intended to assume in a public document or a document certified by a notary public. In case the spouses did not make such a declaration the husband's name became the common family name.

On 1 May 1995 an amendment of the Civil Code entered into force (Federal Law Gazette Nr. 1995/25). S. 93 para. 1 remained unchanged. However, S. 93 para. 3 states that the spouse, who would have to give up her name in accordance with paragraph 1, may, before or at the time of the marriage, in a public document or a document certified by a notary public, declare that she wants to keep her name. In this case both spouses keep their former family names.

Law on Civil Status

Also on 1 May 1995 an amendment to the Law on Civil Status (Personenstandsgesetz) entered into force (Federal Law Gazette Nr. 1995/25). S. 72a para. 4 provides that persons who had to assume their spouses' family name upon concluding a marriage before 1 May 1995, may declare that they intend to assume their former family name again.

COMPLAINTS

The applicant complains that S. 93 of the Austrian Civil Code is discriminatory in that she had to assume her husband's name. She submits in particular that there is no objective reason why the wife should give up her name if the spouses do not agree on their common family name. If the legislature insisted on a common family name for spouses, it was bound to treat husband and wife on an equal basis. She invokes Article 8 of the Convention alone and in combination with Article 14, as well as Article 5 of Protocol No. 7.

THE LAW

The applicant complains that S. 93 of the Austrian Civil Code is discriminatory in that she had to assume her husband's name. She invokes Article 8 (Art. 8) of the Convention alone and in combination with Article 14 (Art. 8+14), as well as Article 5 of Protocol No. 7 (Art. 8+P7-5).

Before examining the applicant's complaint, the Commission has to consider whether the applicant can still claim to be a victim of a violation of the Convention rights invoked by her.

Article 25 para. 1 (Art. 25-1) of the Convention is worded as follows:

"The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, ...".

The Commission notes that the relevant domestic law has changed since the introduction of the application. Under S. 93 of the Austrian Civil Code in the version which entered into force on 1 May 1995, both spouses retain their former names, if the wife declares before or at the time of the marriage that she wants to keep her name. Moreover, this amendment was given retroactive effect in that persons who had to assume their spouses' family name upon concluding a marriage before 1 May 1995, may declare that they intend to assume their former family name again in accordance with S. 72a para. 4 of the Law on Civil Status.

Having regard to the amendment of the Austrian law, which enables the applicant to assume her former family name, the Commission considers that she can no longer claim to be a victim within the meaning of Article 25 (Art. 25) of the Convention of a violation of Article 8 (Art. 8) of the Convention alone or in combination with Article 14 (Art. 8+14), or of Article 5 of Protocol No. 7 (Art. 8+P7-5) (see *mutatis mutandis* No. 14723/89, Dec. 9.7.1992, D.R. 73 p 81, 94).

It follows that the application is manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION INADMISSIBLE.

M.F. BUQUICCHIO
Secretary
to the First Chamber

J. LIDDY
President
of the First Chamber